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5 IN THE SUPERIOR COURT

6 STATE OF ARIZONA, COUNTY OF YAVAPAI

7 STATE OF ARIZONA,

8 Plaintiff,

9 vs.

10 JAMES ARTHUR RAY,

11 Defendant.

SUPERIOR COURT
YAVAPAI COUNTY, ARIZONA

2010 DEC 17 PM 4: 22

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V1300CR201080049

**STATE'S REPLY RE: MOTION TO
COMPEL DISCLOSURE OF AUDIO
RECORDING OF 2009 SPIRITUAL
WARRIOR RETREAT**

(The Honorable Warren Darrow)

12
13 The State of Arizona, through undersigned counsel, files this Reply to Defendant's
14 Response to the State's Motion to Compel Disclosure of Audio Recording of 2009 Spiritual
15 Warrior Retreat.

16 **MEMORANDUM OF POINTS AND AUTHORITIES**

17
18 Defendant responds to the State's Motion to Compel by arguing that the State has not
19 shown a substantial need for the audio recording; that the act of producing the audio is an
20 incriminating communicative act; that the 5th Amendment bars the Defendant's compelled
21 disclosure; that the Defendant's production of the audio authenticates the recording and facilitates
22 its admission; and that the production raises constitutional privacy concerns. As explained below,
23 the Defendant's position is not supported by the law.

24 **I. The State has a substantial need for the recording.**

25
26 Defendant argues that the State has not shown substantial need under Rule 15.2(g),
Arizona Rule of Criminal Procedure, because the audio is not relevant and not necessary as

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1 witnesses are available to testify at trial about the recording. In fact, the audio is extremely
2 relevant and the best and most accurate evidence of what Defendant told participants prior to
3 entering the sweat lodge.

4 Testimony at the rule 404b hearing has established that Defendant gave participants a
5 briefing prior to entering the sweat lodge during which he told participants they might vomit,
6 experience an altered consciousness, or pass out in the sweat lodge, and that these reactions were
7 normal. In fact, these statements by Defendant describe the symptoms of hyperthermia and heat-
8 related illness. Both Dr. Lyon and Dr. Fischione, the State's medical examiners, have described
9 the symptoms of heat stroke as including vomiting and an altered mental status. Defendant's pre-
10 sweat lodge ceremony statements prove he knew that participants had experienced medical
11 distress in his prior sweat lodges and prove his mental state of "recklessly." Evidence that
12 Defendant informs participants that they may experience these symptoms goes directly to the
13 requisite mental state for his crimes and to his knowledge that previous participants in his sweat
14 lodge had experienced medical distress. The recording is also relevant to explain that participants
15 did not exit the sweat lodge upon experiencing medical distress because they had been told by
16 Defendant that the symptoms were normal.
17
18

19 The recording provides the best evidence of exactly what Defendant told the participants
20 prior to entering the sweat lodge. The fact that many of the State's witnesses will testify about
21 Defendant's pre-sweat lodge statements does not negate the State's substantial need for the audio
22 recording.
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26

II. The recording is a corporate record.

A. Spiritual Warrior was an event held by James Ray International.

The Spiritual Warrior Seminar was an event held by the corporate entity of James Ray International, Inc., (JRI). Participants' checks and credit card payments were made to JRI. Prior to attending the Spiritual Warrior Seminar, each participant was required to sign a Publicity Release Form that stated the following:

In consideration for the opportunity to participate in and appear at *this James Ray International, Inc. event (the "Event")*, the undersigned ("Participant") does hereby grant to James Ray International, Inc. ("JRI") and its affiliated companies, successors, licensees, distributors and assigns JRI the unrestricted right to fix Participant's image, participation and/or performance, as it appears in the Event, in whole or in part, by any means or method; and to use Participant's name, voice, image and/or likeness as it appears in the Event, by any means, in any form, content or medium, including, without limitation, television, radio, internet, wireless, podcasting, theatrical and home distribution, sound recording, publishing and merchandising, and in order to advertise, promote or market JRI and its events.

Exhibit A, at Bates No. 001633. (emphasis added)

B. The recording is not "quintessentially personal."

As explained in the State's Motion, the recording was made by Michael Barber, a contractor to JRI, whose job at "the Event" was, in part, to audio record the various events. Mr. Barber retained possession of the recording for several days following the event in October 2009 and then gave the recording to Josh Fredrickson, an employee of JRI. The recordings were intended to be edited and later used to "advertise, promote or market JRI and its events." *Id.* There were over 60 participants who were present at the briefing prior to the sweat lodge ceremony. The recording contains not only Defendant's statements, but also the statements and questions of the participants. Despite these uncontested facts, Defendant insists the recording is not a corporate record, but is instead "quintessentially personal and testimonial."

1 There is no factual support for Defendant's characterization of the recording as personal.
2 The statements on the recording are not private or personal, nor were they compelled in any
3 manner by the State or anyone else. The fact that Defendant's statements are on the recording
4 does not make it less of a corporate record. See *State v. Far West Water & Sewer Inc.*, 224 Ariz.
5 173, ¶ 77, 228 P.3d 909, 931 (App. 2010) ("[S]tatements made by corporate officials in their
6 representative capacity are statements of the corporation and are admissible against it.")

7
8 The official records of a corporation cannot be the subject of the personal privilege against
9 self-incrimination. *Braswell v. United States*, 487 U.S. 110-111, 108 S.Ct. 2284, 2292 (1988)
10 (quoting *United States v. White*, 322 U.S. 694, 699, 64 S.Ct. 1248, 1251 (1944)). This is true even
11 if the production of the papers might tend to incriminate the representative of the corporation. *Id.*
12 This principle applies "regardless of how small the corporation may be." *Bellis v. United States*,
13 417 U.S. 85, 100, 94 S.Ct. 2179, 2189 (1974).

14
15 **II. Defendant's Fifth Amendment protection against compelled self-incrimination**
16 **is not violated by the production of the recording.**

17 **A. *State v. Hyder* is distinguishable from the present case.**

18 Defendant argues his Fifth Amendment protection against compelled self-incrimination
19 will be violated by the production of the recording, citing *State ex rel. Hyder v. Superior Court*,
20 128 Ariz. 253, 257, 625 P.2d 316, 320 (1981). In *Hyder*, the State attempted to obtain letters
21 written by the defendant by issuing a subpoena directing the defendant to produce "[a]ny and all
22 personal letters written to [the daughter] by [the defendant]." *Id.* at 245, 625 P.2d at 317. Noting
23 that "[c]ompelled self-incrimination occurs when an individual is forced to make an incriminating
24 communicative act," the Arizona Supreme Court held that the act of producing the letters would
25 force the defendant to admit, by the wording of the subpoena, that he is their author. *Id.* at 256,
26 625 P.2d at 319. The Court distinguished the nature of the letters written by the defendant from

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1 the documents sought from taxpayers' attorneys in *Fisher v. United States*, 425 U.S. 391, 96 S.Ct.
2 1569 (1976).

3 In *Fisher*, the government sought work papers created by accountants in preparing
4 taxpayers' returns. The Court found that producing the papers through their attorneys is not a
5 communicative act, but merely an admission by the taxpayers that the papers existed and that they
6 were in the taxpayers' possession, through their attorneys. "It is doubtful that implicitly admitting
7 the existence and possession of the papers rises to the level of testimony within the protection of
8 the Fifth Amendment. . . . The existence and location of the papers are a foregone conclusion and
9 the taxpayer adds little or nothing to the sum total of the Government's information by conceding
10 that he in fact has the papers. Under these circumstances by enforcement of the summons 'no
11 constitutional rights are touched. The question is not of testimony but of surrender.' *In re Harris*,
12 221 U.S. 274, 279, 31 S.Ct. 557, 558, 55 L.Ed. 732, 735 (1911)." *Fisher v. United States*, 425
13 U.S. 391, 411, 96 S. Ct. 1569, 1581, 48 L. Ed. 2d 39 (1976).
14
15

16 The production of the recording in this case is distinguishable from the production of the
17 defendant's written letters in *Hyder*. The letters in *Hyder* were the personal letters of the
18 defendant who was accused of sexual conduct with his minor daughter. The letters, which were
19 written to his daughter, discussed the sexual conduct. In the instant case, the State is seeking the
20 production of the recording of the Spiritual Warrior Seminar 2009 created by Michael Barber. In
21 producing the recording, Defendant does not have to admit or authenticate anything. Mr. Barber
22 will lay the foundation at trial for the admission of the audio recording.
23

24 Like the circumstances in *Fisher v. United States, supra*, 425 U.S. 391, 96 S.Ct. 1569
25 (1976), "the existence and the location of the papers are a foregone conclusion" and Defendant
26 adds little or nothing to the sum total of the State's information by conceding that he in fact has

1 the recording. *Id.* at 411, 96 S.Ct. at 1581. (See also *Barrett v. Acevedo*, 169 F.3d 1155, 1168 (8th
2 Cir. 1999) (When the existence, possession and authenticity of the defendant's journal were
3 already known to law enforcement officers, the defendant's act of producing the journal "add[ed]
4 little or nothing to the sum total of the Government's information by conceding that he in fact
5 [had] the papers." (quoting *Fisher, supra* at 411, 96 S.Ct. at 1569)). As the Supreme Court noted
6 in *Fisher*:

8 This Court has also time and again allowed subpoenas against the custodian of
corporate documents or those belonging to other collective entities such as unions
9 and partnerships and those of bankrupt businesses over claims that the documents
will incriminate the custodian despite the fact that producing the documents tacitly
10 admits their existence and their location in the hands of their possessor.

11 *Fisher, supra*, 425 U.S. at 412, 96 S.Ct. at 1581.

12 **III. The 5th Amendment only prevents compelled testimony.**

13 Without explanation, Defendant claims the recording is 'quintessentially personal' and
14 that "the personal nature of the evidence the State seeks raises constitutional privacy concerns."
15 The State is unable to identify how the statements are protected by any privacy concerns. As
16 noted above, to the extent the recording contains Defendant's statements, they were made to over
17 60 people and recorded by a private contractor. Defendant appears to base his argument on the
18 fact that Defendant's personal statements are on the recording. At least one state court has
19 rejected this very argument. In *Matter of Application to Quash A Grand Jury Subpoena Duces*
20 *Tecum, Dated Dec. 28, 1992*, 157 Misc. 2d 432, 597 N.Y.S.2d 557 (Sup1993), the New York
21 Supreme Court noted the following:

24 The privilege against self-incrimination does not attach automatically because the
items sought are tape recordings, even though the recordings contain incriminating
25 statements of the person compelled to produce them. Although a tape recording is
"clearly testimonial in that it is an aural record of the accused's communication,"
26 this does not end the inquiry. The defendant cannot avoid compliance with a
subpoena for an item in his possession "merely by asserting that the item of

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evidence which he is required to produce contains incriminating [statements], whether his own or that of someone else." Nor is the fact alone that the defendant may be heard to incriminate himself with his own voice, grounds for invoking the privilege where as here there is no claim that the government compelled the defendant to speak. This is true even though the defendant was the author of the tape sought.

Id., at 436-37, 597 N.Y.S.2d at 560-61. (internal citations omitted)

In *In re Proceedings before the August 6, 1984 Grand Jury*, 767 F.2d 39 (1985), the Second Circuit Court of Appeals addressed the claims of a defendant that the production of a voluntarily prepared recording of his conversation at a restaurant was a personal record; that both the act of producing the tape recording and the contents of the tape were incriminating; and therefore the fifth amendment gave him the right to withhold the recordings. In rejecting this argument, the court stated, "[t]he fifth amendment privilege only prevents 'compelled self-incrimination.' The act of producing business records may in certain circumstances have a testimonial character and fall within the fifth amendment's coverage, but the contents of voluntarily prepared business records are not privileged unless the subpoenaed individual is compelled to 'restate, repeat, or affirm' the content's truth." *Id.* at 41. (internal citations omitted)

The recording at issue in this case was voluntarily prepared. Defendant's statements, as preserved on the recording, were voluntarily made with absolutely no compulsion from the State. Defendant's argument to the contrary is not supported by the facts in this case.

RESPECTFULLY submitted this 17th day of December, 2010.

By Sheila Sullivan Polk

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COPIES of the foregoing emailed this
19th day of December, 2010, to:

Hon. Warren Darrow
Dtroxell@courts.az.gov

Thomas Kelly
tskelly@kellydefense.com

Truc Do
Tru.Do@mto.com

By:

COPIES of the foregoing delivered this
19th day of December, 2010, to:

Thomas Kelly
Via courthouse mailbox

Truc Do
Munger, Tolles & Olson LLP
355 S. Grand Avenue, 35th Floor
Los Angeles, CA 90071-1560

Via U.S. Mail

By:

PUBLICITY RELEASE FORM

**PLEASE READ CAREFULLY.
BY SIGNING THIS FORM YOU ARE WAIVING ALL RIGHTS TO
COMPENSATION.**

In consideration for the opportunity to participate in and appear at this James Ray International, Inc. event (the "Event"), the undersigned ("Participant") does hereby grant to James Ray International, Inc. ("JRI") and its affiliated companies, successors, licensees, distributors and assigns JRI the unrestricted right to fix Participant's image, participation and/or performance, as it appears in the Event, in whole or in part, by any means or method; and to use Participant's name, voice, image and/or likeness as it appears in the Event, by any means, in any form, content or medium, including, without limitation, television, radio, internet, wireless, podcasting, theatrical and home distribution, sound recording, publishing and merchandising, and in order to advertise, promote or market JRI and its events.

Participant does hereby forever release and discharge JRI, its officers, directors, employees, agents, representatives, successors, assigns and licensees (the "Released Parties"), from any and all actual or potential, known or unknown, suspected or unsuspected claims, causes of action, liabilities and damages based upon or arising out of any use of Participant's name, voice, image likeness, or appearance in or in connection with the advertising, promotion or marketing of JRI and its events, including, without limitation, any and all claims that Participant has or may have for defamation, invasion of privacy or violation of the right of publicity, notoriety or any other claims arising out of or relating to any use by JRI of Participant's name, voice, likeness or appearance. This release and the legal relations between the parties shall be governed by and construed in accordance with the laws of the State of California, without regard to conflicts of law doctrines.

Kirby Brown
Participant's Name (Printed)
Kirby Brown
Participant's Signature
October 3, 2009
Date

Lynette Wachterhauser
Witness's Name (Printed)
Lynette Wachterhauser
Witness's Signature
10/3/09
Date

Witness's statement: I was present and observed
the above person read and sign this form.

If the participant is under the age of 18 years old, signature of a parent or legal guardian is required below. As parent/legal guardian of the above stated participant, I hereby agree and accept all of the above stated terms on behalf of my dependent.

Parent/Guardian's Name (Printed)

Parent/Guardian's Signature

Relationship to Minor

Date